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University Trademarks and "Mixed Speech" on College Campuses: A Case Study of *Gerlich v. Leath* and Student Free Speech Rights

Nathan Converse*

Higher education has long been a fundamental building block upon which American democracy is based. The guarantee of free speech is itself a revered liberty in the American polity; it has, in turn, served as the catalyst for higher education. Recent events on college campuses continue to reexamine universities' role in their students' education and push the legal boundaries on student speech rights. In many instances, however, students' speech and expressive viewpoint conflicts with that of other students. Other times, students' speech conflicts with the expressive interests of their university. This Article examines the latter instance in the context of university trademarks. Gerlich v. Leath*, a recent decision by the Eighth Circuit Court of Appeals, serves as a case study to elaborate on the complexities that arise when analyzing free speech rights in instances where students' expressive interests often compete with, and sometimes conflict with, those of public colleges and universities.*

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INTRODUCTION

Higher education has long been a fundamental building block upon which American democracy is based.[1] The guarantee of free speech serves as the catalyst for higher education,[2] which shares a revered place in the American polity and democratic form of self-government.[3] As the Supreme Court famously declared in 1969: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[4] Indeed, freedom of expression is imperative to a university's mission of preparing students to become informed and engaged citizens.[5]

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1 *See, e.g.,* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); R. George Wright, *Campus Speech and the Functions of the University*, 43 J. C. & U. L. 1, 8 nn.53–54 (2017) (quoting DEREK BOK, HIGHER EDUCATION IN AMERICA 1 (rev. ed. 2015)); Robert M. Hutchins, *The College and the Needs of Society*, 3 J. GEN. EDUC. 175, 179, 181 (1949).

2 "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." Healy v. James, 408 U.S. 169, 180–81 (1972).

3 "Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (citing *Brown*, 347 U.S. at 493).

4 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

5 *Brown*, 347 U.S. at 493. *See also, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (internal citations omitted).

Despite the importance that the First Amendment plays in the intellectual and civic development of the American youth, expressive rights possessed by students are far from "clearly defined."[6] Indeed, First Amendment case law implicating the speech rights of students and their expressive interests as speakers becomes far more complex in the public school and university setting.[7] Universities in particular are bastions of expressive thought—both academic and otherwise—and it is readily apparent that contrasting ideas will result in conflicting speech.[8] Courts have contributed to this tension by failing to adhere to a single doctrine or framework in analyzing free speech claims brought by students against their universities.[9] Without a coherently articulated framework by which to analyze expressive rights on university campuses and a proper consideration of the interests involved, neither students nor higher education institutions can properly function in harmony.[10]

The Eighth Circuit Court of Appeal's recent addition to First Amendment jurisprudence in the higher education setting in the case *Gerlich v. Leath* (*Gerlich III*)[11] contributes to a confusing and largely incoherent body of law surrounding the regulation of student speech rights on university campuses. While the first question at issue in *Gerlich* revolved around whether the public university had violated a student organization's First Amendment rights by denying it use of its federally-registered trademark, the second question pertained to university officials' individual

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6 "The mixture of muddled reasoning and inconsistent decisions invites needless litigation . . . While there is more than enough uncertainty to go around throughout all of the student speech case law, the adjudication of cases involving student speech in school-sponsored activities is particularly chaotic." Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 721 (2009).

7 *See generally Healy*, 408 U.S. 169 (holding that the college administration had the burden to show why a student organization should not be recognized).

8 *Id.* at 187.

9 *See generally* Oyama v. Univ. of Hawaii, 813 F.3d 850 (9th Cir. 2015) (outlining the tensions of competing expressive interests in the higher education setting and noting different analytical approaches that various federal circuit courts have taken to this issue).

10 *See* Brownstein, *supra* note 6, at 721.

11 861 F.3d 697 (8th Cir. 2017).

liability for the constitutional tort.[12] Naturally, the heart of this case hinged on whether it is "clearly established" under the law that the First Amendment rights of university students in recognized student organizations are violated when the student organization is denied unqualified use of their university's federally-registered trademark.[13] While the Eighth Circuit's decision reached the right result in that *post-hoc* viewpoint discrimination is a never constitutionally-permissible reason for regulating student speech, the Eighth Circuit's reasoning relied on an incomplete picture of the full range of expressive interests at stake. The purpose of this

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[12] Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 704 (8th Cir. 2017) (addressing the university's qualified immunity argument, framing the issue as evaluating whether the university "violated their First Amendment rights by engaging in viewpoint discrimination").

[13] "Qualified immunity attaches when an official's conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' While this Court's case law 'does not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.' In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" White v. Pauly, 137 S. Ct. 548, 551 (2017) (internal citations omitted). Recent commentators have attracted the attention of courts in arguing that the historical, legal, and constitutional justifications for qualified immunity do not justify its existence as a judicially-created doctrine. William Baude, *Is Qualified Immunity Unlawful?,* 106 CAL. L. REV. 45 (2018); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244–50 (2015). *See also* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("This unwarranted summary reversal [of summary judgment in favor of the injured plaintiff] is symptomatic of a disturbing trend regarding the use of this Court's resources in qualified-immunity cases. As I have previously noted, this Court routinely displays an unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases. Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.") (internal citations omitted); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring) ("In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute . . . . Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in interpret[ing] the intent of Congress in enacting the Act. Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make.") (internal quotations omitted).

Article is to point out that, though incompatible with principles of "government speech," concluding university-owned intellectual property creates a "limited public forum" for students' use is not such a clear answer, even if it is ultimately proper to treat it as such for purposes of protecting vulnerable student speech from unconstitutional viewpoint discrimination under the First Amendment.

This Article examines the *Gerlich* decision and elaborates on the complexities that arise when analyzing student speech rights, when such speech competes with, or even conflicts with, university interests.[14] Specifically, this Article will review the court's over-simplification of the rights and interests at stake in the original opinion, and more thoroughly scrutinize the intricacies of student speech rights on university campuses—particularly in the area of university intellectual property.[15] Though the Eighth Circuit's ruling upon rehearing provides a more academically rigorous analysis than the original panel opinion, it nevertheless misses the analytical mark and fails to fully evaluate the student speech rights at stake. In Part I, this Article lays out the factual background and the interests of both sides upon which the *Gerlich* decision is rooted.[16] Part II discusses the nuanced tensions that exist when examining First Amendment rights in the setting of a higher education institution—namely, that such circumstances present unique instances of "mixed speech," where both the university and its students are expressing a message particular to their own interests.[17] Part III analyzes both parties' respective arguments in light of these complexities.[18] This Article concludes that the issue

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14 *See* discussion *infra* Parts I, II.

15 *See id.*

16 *See* discussion *infra* Part I.

17 *See generally infra* Part II. "Mixed speech" consists of instances of expressive activity that captures the interests—and implicates the rights—of both private and government actors. *See* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 627–40 (2008) (identifying five factors by which the category of "mixed speech" should be recognized: (1) the identity of the literal speaker; (2) the person or entity that controls the message; (3) the source of funding for the expression; (4) the "speech goal"; and (5) the party to whom a reasonable person would attribute the speech).

18 *See* discussion *infra* Part III.

of university trademarks and student speech rights is much more nuanced than the Eighth Circuit has made it out to be—it is very much not clearly established law. The underlying problem in student free speech cases—which the *Gerlich* decision exemplifies particularly well—is that courts tend to view university First Amendment cases in a binary system: public university speech versus private student speech, emphasizing one to the exclusion of the other.[19] Finally, Part IV lays out several points that courts should consider in future First Amendment litigation in the higher education setting, and recommends preventative steps that universities can take to limit their liability from First Amendment violation allegations in light of the *Gerlich* decision.[20]

Student speech rights do not end at the schoolhouse gates, but it remains to be seen exactly how far they extend into the daily operations of a public university. This paper argues that the *Gerlich* decision would suggest that they are fairly invasive, and growing. But for reasons discussed below, there is reason to question the strength of the *Gerlich* opinion.[21] The relevant question is not whether student speech rights should be curtailed on university campuses, but rather, to what extent student speech rights should prevail when they compete with—or conflict with—the expressive interests of the university.[22]

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[19] *See infra* Part II (describing how established First Amendment doctrines gloss over instances where a multiplicity of expressive interests are at stake, especially when applied in the higher education context); *see also infra* Part III (analyzing how the arguments advanced on both sides of the *Gerlich* decision implicate the same problems and similarly demonstrate mixed speech issues that require careful resolution).

[20] *See generally infra* Part IV.

[21] *See infra* Parts III & IV (contrasting the private speech forum analysis with government speech analysis and concluding neither adequately describes or considers the expressive interests at stake in *Gerlich*).

[22] Brownstein, *supra* note 6, at 729.

I. GERLICH V. LEATH

A. Setting the Stage: NORML and Student Advocacy on College Campuses[23]

Iowa State University ("ISU") is a public land grant university located in Ames, Iowa, enrolling over 35,000 students and fostering more than 800 officially-recognized student organizations on its campus.[24] One of these organizations is the Iowa Student Chapter of the National Organization for the Reform of Marijuana Laws ("NORML").[25] NORML is a nationally-affiliated student organization that advocates for reforming federal and state marijuana laws for both recreational and medicinal use.[26]

ISU made its trademarks available for the use of student organizations, but requires that designs submitted by groups first obtain the approval of the university's Trademark Licensing Office.[27] The Trademark Office, in turn, was responsible for determining that the student organization's proposed use of the trademark complies with ISU's Guidelines for University Trademark Use by Student and Campus Organizations.[28] As stated by the Trademark Office, the main goals of ISU's trademark policy were to:

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[23] The facts of *Gerlich v. Leath*, as discussed in this Article, pertain to those existing at the time of the incidents underlying the dispute as reflected in the decision before the district court and on appeal before the Eighth Circuit Court of Appeals.

[24] Iowa State University Office of the Registrar*, Enrollment Statistics*, IOWA ST. U., http://www.registrar.iastate.edu/enrollment [https://perma.cc/VT3E-9Z7T] (last visited Oct. 9, 2018).

[25] Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 701 (8th Cir. 2017). *See also Constitution of the Iowa State Chapter of the National Organization for the Reform of Marijuana Laws*, ISU STUDENT ORGANIZATION DATABASE, https://www.stuorg.iastate.edu/site/normlisu [https://perma.cc/2UDP-9E3D] (last visited Oct. 9, 2018).

[26] *Constitution of The Iowa State Chapter of the National Organization for the Reform of Marijuana Laws*, *supra* note 25, at Art. I § 2.

[27] *Gerlich III,* 861 F.3d at 701. *See also* Iowa State University Trademark Licensing Office, *Trademark Management Policy Statement*, IOWA ST. U. (2018), http://www.policy.iastate.edu/policy/trademark/ [https://perma.cc/5RZD-QAT7].

[28] Iowa State University Trademark Licensing Office, *supra* note 27.

- Promote and protect Iowa State University through implementation of a management system, which establishes the means for consistent, favorable, and professional use of the Marks;
- Fulfill the legal obligation to protect the Marks;
- Protect the consumer from deception or from faulty or inferior products and services bearing the university's Marks;
- Provide fair and equitable treatment of all licensees; and
- Realize and distribute earned royalties and other revenues for the benefit of the university.[29]

The Guidelines granted student organizations the privilege of using the marks, but insisted that the designs "appropriately portray the image of the University" and avoid "the appearance of a University endorsement."[30] One of ISU's federally-registered trademarks is its mascot, "Cy," the feature of the dispute.[31]

The Iowa State Chapter of NORML was established as a student organization on ISU's campus in October 2012.[32] In an effort to attract members and promote the organization, NORML promptly submitted a t-shirt design to ISU's Trademark Office, seeking permission to use the Cy trademark in its design.[33] The t-shirts were intended to raise awareness of Iowa marijuana legislation on ISU's campus and promote the student organization.[34] This first design submitted by NORML had "NORML ISU" on the front with the "O" replaced by an image of Cy.[35] The back of the shirt contained a line that read, "Freedom is

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29 *Id.*

30 Brief for Appellant at 4, Gerlich v. Leath (*Gerlich II*), 847 F.3d 1005 (8th Cir. 2017) (No. 16–1518) [hereinafter Brief for Appellant].

31 *Id.* at 3.

32 *Gerlich III*, 861 F.3d at 701.

33 *Id.* at 701–03.

34 Brief for Appellee at 2–4, Gerlich v. Leath (*Gerlich II*), 847 F.3d 1005 (8th Cir. 2017) (No. 16–1518), 2016 WL 2865243 [hereinafter Brief for Appellee].

35 *Gerlich III*, 861 F.3d at 701.

NORML at ISU," accompanied by a small cannabis leaf.[36] The ISU Trademark Office approved this proposed design for use of ISU's trademark on NORML's t-shirt order several days later.[37]

On November 19, 2012, the Des Moines Register published an article discussing the marijuana legalization referenda in Colorado and Washington while drawing attention to advocacy efforts by organizations like NORML to similarly change Iowa's marijuana laws.[38] The article, quoting several members of NORML's student leadership, stated that NORML received "nothing but support from the university."[39] The article went on to examine the student organization's efforts on ISU's campus, and surveyed various policy opinions regarding medical marijuana.[40]

After the article was published, ISU claimed to receive immediate communication from members of the public expressing concern that the design suggested that the university endorsed NORML's political and legislative agenda.[41] More concerning, the university said, was the implication that the student organization was advocating drug use.[42] The same day that the article ran in the Register, ISU received calls from a legislative staffer for the Iowa House Republican Caucus, as well as an aide for the Governor's Office for Drug Control Policy, inquiring as to whether ISU's licensing office had approved of and endorsed the use of the university's logo for the NORML ISU t-shirt.[43] ISU's President and his staff reportedly spent the rest of the day dealing with the "political public relations implications" of the t-shirt design, and immediately scheduled a meeting with senior administration officials to address the issue.[44]

On November 24, 2012, several weeks after the article was published, NORML requested approval from the Trademark Office

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36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 701–02; Brief for Appellant, *supra* note 30, at 3–5.
42 *Gerlich III*, 861 F.3d at 701–02; Brief for Appellant, *supra* note 30, at 4–5.
43 *Gerlich III*, 861 F.3d at 702–03.
44 *Id.* at 702.

for the use of the same design submitted in October on another order.[45] ISU officials in the Trademark Office denied that request on December 3, 2012.[46] Meeting with the NORML student leadership, ISU informed the organization that it would not approve any other designs using images of cannabis leaves alongside ISU trademarks.[47] Officials further instructed NORML student leadership that the group was required to obtain the approval of ISU administration, including the Senior Vice President of the Division of Business & Financial Affairs and Senior Vice President for Student Affairs, before submitting any future t-shirt designs to the Trademark Office.[48]

At the direction of the university president, ISU subsequently revised its Trademark Guidelines on January 16, 2013.[49] The new guidelines prohibited "designs that suggest promotion of the below listed items . . . dangerous, illegal or unhealthy products, actions or behaviors; . . . [or] drugs and drug paraphernalia that are illegal or unhealthful."[50] ISU officials expressly indicated that this revision to the Trademark Guidelines "was done as the result of a number of external comments including interpretations that the t-shirt developed indicated that Iowa State University supported the NORMAL ISU advocacy for the reform of marijuana laws."[51] Accordingly, the Trademark Office continued to reject further design requests by NORML that directly referenced "marijuana" in picture or text.[52] Significantly, however, the ISU Trademark Office approved several designs that omitted the picture of a cannabis leaf or explicit mention of marijuana but retained the same views and agenda of NORML.[53]

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45 *Id.*

46 *Id.* at 703.

47 *Id.* at 703–04.

48 *Id.* at 705.

49 *Id.* at 702–03.

50 Iowa State University Trademark Licensing Office, *Guidelines for University Trademark Use by Student and Campus Organizations*, IOWA ST. U. (2018), at 6, http://www.trademark.iastate.edu/sites/default/files/imported/policy/TM_student.pdf [https://perma.cc/F84D-BZAJ].

51 *Gerlich III*, 861 F.3d at 703 (internal edits omitted).

52 *Id.*

53 *Id.*

NORML filed a lawsuit in Iowa state district court, which ISU later removed to the federal district court in the Southern District of Iowa.[54] The district court granted summary judgment for NORML, agreeing with the plaintiffs that the denial of use of ISU trademarks, along with the subsequent change in the university's trademark use policy, were "naturally predicated on the political content of the group's views," constituting impermissible viewpoint discrimination against the organization in violation of the students' First Amendment rights.[55]

B. Appeal to the Eighth Circuit Court of Appeals

Throughout litigation, ISU advanced two core concerns: (1) the consequences of allowing ISU's trademark to be placed next to an image of an illegal drug that is recognized as a symbol for illicit drug use and (2) confusion surrounding the public's perceived endorsement of NORML's political and legislative agenda.[56] As "inherently expressive devices," ISU urged the court to consider the expressive implications that occur when its trademark is associated with message with which it does not agree.[57]

By contrast, NORML emphasized that endorsement from the university was exactly what it desired—and was entitled to—as a recognized student organization on ISU's campus.[58] NORML further asserted that ISU discriminated against it because of its views on drug policy reform, in clear violation of First Amendment case law protecting the students' right of association.[59] It is noteworthy to point out that the record reflected that students of NORML *intended* public confusion, and aimed for the perception that ISU was endorsing NORML's message and political agenda.[60]

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54 *Id.*

55 Gerlich v. Leath (*Gerlich I*), 152 F.Supp.3d 1152, 1172 (S.D. Iowa 2016).

56 Brief for Appellant, *supra* note 30, at 5–6, 30–31, 34, 36–37, 42–43; *see generally Gerlich III*, 861 F.3d 697.

57 Brief for Appellant, *supra* note 30, at 33.

58 *See* Brief of Appellee, *supra* note 34, at 18–21, 31–36.

59 *See id.* at 18–21.

60 Brief for Appellant, *supra* note 30, at 9.

1. Iowa State University's Position and the Interests of Higher Education Institutions

Upon appeal to the Eighth Circuit, ISU's primary assignment of error was, first and foremost, that the district court misidentified and mischaracterized the nature of the speech at issue.[61] Specifically, the university argued that ISU, as a long-standing institution of higher education, had crafted a very particular message and cultivated a distinct public image through the selective use of its trademark and emphasized the large role its trademarks play in promoting ISU's institutional image as a welcoming campus and serious academic institution.[62] ISU further impressed the importance of the university to maintain the use of its trademark:

It is undisputed that ISU's trademarks are means by which the University communicates its messages, connects with its stakeholders, and promotes its brand. ISU uses its trademarks to attract prospective students, private and governmental support, new faculty and staff, and to encourage alumni participation and support. Through decades of effort and careful management, ISU has built public goodwill into its trademarks, and as a result its trademarks carry considerable communications and commercial value.[63]

In other words, in order for a trademark to accurately and effectively communicate the university's message, an institution of higher education naturally must exercise "careful management and editorial discretion" regarding the messages and images with which it is associated.[64]

As a result of this particularly-crafted message, ISU asserted that such expressive qualities inherent in a federally-registered trademark constituted speech of the university itself.[65] ISU argued

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61 *See id.* at 33–34.

62 *Id.*

63 *Id.* at 53 (citing *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *cert. granted,* Lee v. Tam, 137 S. Ct. 30 (2017)).

64 *Id.* at 44.

65 *Id.* at 29; *see also* Reply Brief for Appellant at 3–10, Gerlich v. Leath (*Gerlich II*), 847 F.3d 1005 (8th Cir. 2017) (No. 16-1518).

that the constitutional issue regarding ISU's trademark-use policy for student organizations did not revolve around the viewpoint of NORML or the political statements expressed on its t-shirts; rather, it contended that ISU's *trademark itself* constituted government speech by the public university, and as such was beyond the reach of First Amendment protections.[66]

Broadly speaking, the government speech doctrine recognizes that public bodies have expressive interests and produces speech that is "meant to convey and have the effect of conveying a government message."[67] When the government engages in expressive activity of its own, as opposed to merely "managing government property," forum analysis is inapplicable because the government itself is speaking rather than providing a "forum" through which ordinary citizens express themselves.[68] The two seminal cases defining the Government Speech Doctrine are *Pleasant Grove City v. Summum*[69] and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[70] In *Pleasant Grove City*, the Supreme Court held that the First Amendment did not place restrictions on the expression undertaken by government entities themselves because, under First Amendment precedent, "[a] government entity has the right to 'speak for itself' and 'is entitled to say what it wishes,' and to select the views that it wants to express."[71] The court reasoned that this same principle applied when the government used private speakers to express a government-controlled message.[72] In *Pleasant Grove City*, a religious organization requested permission from the city to erect a stone monument that contained its own religious tenants and place it in a park near a similarly-sized monument displaying the Ten

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66 Brief for Appellant, *supra* note 30, at 30.

67 Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250–51 (2015) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009)).

68 *Id.*

69 555 U.S. 460 (2009).

70 135 S. Ct. 2239 (2015).

71 555 U.S. at 467–68 (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2010)); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995); Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

72 *Pleasant Grove City*, 555 U.S. at 468 (citing *Rosenberger*, 515 U.S. at 833).

Commandments.[73] The city rejected the request,[74] and the organization sued, alleging the city violated its First Amendment rights by discriminating against its viewpoint, since the municipality had previously erected a monument to the Christian faith but rejected that of "the Seven Aphorisms of Summum."[75]

The Supreme Court concluded the municipality was exercising a form of government speech when it allowed the placement of permanent monuments in a city park donated to the city.[76] Rather than opening up the park for *private* donors to display whatever monuments they wished, creating a public forum, the city "effectively controlled" the messages expressed by the monuments when the municipality gave its "final approval authority" over their placement in the park.[77] Accordingly, the court rejected the plaintiff-religious organization's argument that the city violated its First Amendment rights by discriminating against its expressive viewpoint when the city declined to grant the organization permission to place its own monument in the park.[78] The city's decision, then, was immune from First Amendment scrutiny.[79] *Pleasant Grove City* ultimately established the principle that the only legal restraints on the government's speech are the Establishment Clause and political opposition: "The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'"[80]

Building off the foundation for the government speech doctrine established in *Pleasant Grove City*, the *Walker* court held that

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73 *Id.* at 465.

74 The city explained to the religious organization that its practice was to limit monuments in the park to those donated to the city that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community," citing safety and aesthetics considerations. *Id.*

75 *Id.*

76 *Id.* at 472.

77 *Id.* at 470–72.

78 *Id.*

79 *Id.*

80 *Id.* (citing Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2010)).

state-issued, personalized license plates expressed the endorsement and viewpoint of the government, and were similarly exempt from First Amendment regulation.[81] There, the "Sons of Confederate Veterans" organization sought to sponsor a specialty license plate through the State of Texas' personalized vanity plate program.[82] Texas rejected an application for a design featuring the Confederate battle flag after public comments reflected a large segment of the population considered the design to be offensive.[83] Just like the municipality's activity with monuments in the park in *Pleasant Grove City*, the Supreme Court held the State of Texas was engaged in its own expressive conduct rather than "simply managing government property" because the specialty license plates were "meant to convey and have the effect of conveying a government message."[84] Relying on the rationale provided in *Pleasant Grove City*, the court concluded that the First Amendment's application to the government' expressive activities in managing a state-sponsored license plate program intended to convey only its own message, not those of other individuals.[85] Thus, the only recourse private individuals can seek against

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[81] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015). The court articulated a three-part test for government speech: whether (1) the government has a history of using the medium to express its viewpoint to the public; (2) the medium is often "closely identified in the public mind" with the government; and (3) the government maintains direct control over the messages conveyed through the medium. *Id.* at 2248–49 (citing *Pleasant Grove City*, 555 U.S. at 470–71, 473).

[82] *Id.* at 2244–45.

[83] *Id.* at 2245.

[84] *Id.* at 2251 (citing *Pleasant Grove City*, 555 U.S. at 472).

[85] "We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. But here, compelled private speech is not at issue. And just as Texas cannot require [a private organization] to convey "the State's ideological message," [that organization] cannot force Texas to include a Confederate battle flag on its specialty license plates." *Id.* at 2253 (citing Wooley v. Maynard, 430 U.S. 705, 715–717, n.15, 97 S. Ct. 1428 (1977); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573, 115 S. Ct. 2338 (1995); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943)).

unpopular speech advanced by the government lies in the political realm.[86]

Citing *Pleasant Grove City* and *Walker*, ISU argued to the Eighth Circuit that the district court erred in holding that a university trademark could only constitute government speech to the extent it conveyed the *actual* and *intentional* endorsement of the university.[87] Rather, ISU urged the court to consider the contrapositive: that government speech also includes choosing not to speak.[88] It would follow, urged ISU, that if universities possess a right to associate themselves with particular messages, they also possess a parallel right to *disassociate* themselves from other messages.[89] Indeed, the *Walker* Court held that a personalized license plate promoting the Confederacy, issued by the State of Texas, expressed an implicit message of state endorsement,[90] and numerous other federal circuit courts have applied the government speech doctrine to instances of government property that are arguably far less expressive than a registered trademark.[91] Why,

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86 "The Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker*, 135 S. Ct. at 2246. Indeed, "[t]hat freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech." *Id.* at 2245 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009), and Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2010).

87 Brief for Appellant*, supra* note 30, at 34–35.

88 *Id.* at 37–38.

89 *Id.* at 34–35. Indeed, "[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, 515 U.S. at 573 (quoting Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1, 11 (1986)).

90 *Hurley*, 515 U.S. at 573; *Walker*, 135 S. Ct. at 2249.

91 *See generally* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070 (11th Cir. 2015) (involving advertisement banners placed on the outfield fence of a school baseball diamond); Sutliffe v. Epping Sch. Dist., 584 F.3d 314 (1st Cir. 2009) (discussing approval of budgets for newsletters, mailings, and other mediums of communication like a website); Page v. Lexington Cty. Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008) (regarding a school district website); Chiras v. Miller, 432 F.3d 606 (5th Cir. 2005) (involving the state selection of environmental science textbooks); Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) (regarding a high school bulletin board); Edwards v. Cal. Univ. of Penn., 156 F.3d 488 (3rd Cir. 1998) (contemplating university curriculum and classroom materials); Knights of Ku Klux Klan v. Curators of

then, couldn't a trademarked-mascot not express the implicit message of official endorsement of the State of Iowa?

2. NORML's Position and the Interests of University Students

The issue remains that explicitly withholding endorsement of a student organization's expressive activities denies a student organization the sense of legitimacy and credibility derived from its association with an institution of higher education.[92] NORML conceded that ISU had a right to approve or disapprove the use of its trademark by student organizations on its campus.[93] However, the group argued that the university could not operate its Trademark Office so as to explicitly discriminate against one group on the basis of its political viewpoint and the particular message it expressed.[94] NORML alleged that ISU manipulated its trademark licensing program specifically to control the expressive activities of the student organization because it received political pushback regarding the group's legislative agenda.[95] To the contrary of ISU's suggestion, NORML asserted the historical use of university trademarks by a wide array of politically and intellectually opposed speakers on campus, along with "the university's traditional station in American society . . . reflects [a university's] rightful commitment to fostering diverse forms of civic engagement and intellectual exploration and debate."[96] Indeed, ISU did not purport to endorse—and in fact explicitly

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Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000) (discussing underwriting acknowledgements by public university radio station.

92 *See* Healy v. James, 408 U.S. 169, 181 (1972) ("There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that [First Amendment] associational right.").

93 *See* Brief for Appellee, *supra* note 34, at 37 ("Defendants claim this is too general a statement and try to reframe the issue as being whether Plaintiffs have a 'right to use ISU marks without limitation.' But Plaintiffs have never claimed such a 'right' and there is no issue of removing 'all limitations' in this case. Rather, this is about Gerlich and Furleigh's right to engage in protected speech without suffering discriminatory treatment or retribution from ISU officials who are trying to curry political favor or avoid a political backlash. That well-established right is beyond question." (internal citations omitted)).

94 *See id.* at 17–20.

95 *See id.* at 12–13.

96 Gerlich v. Leath (*Gerlich I*), 152 F. Supp. 3d 1152, 1175–76 (S. D. Iowa 2016).

disclaimed any intent to endorse—NORML's political agenda; nor did it express approval of the political message of any other student organization when authorizing the organization to use its registered trademark.[97] By contrast, denying the use of a university-owned trademark to one of its student organizations on the basis of its politically-charged message in a viewpoint-discriminatory way seems fundamentally incompatible with the role of a university in fostering civic discourse; thus violating the students' right to freedom of expression.[98]

NORML relied on key cases prohibiting viewpoint discrimination by a university against its student in exercising their First Amendment free speech and associational rights on university campuses.[99] In *Healy v. James*,[100] for instance, the Supreme Court found that the university had violated its students' First Amendment right to free speech and association by refusing to grant official recognition to a student organization advocating for far "left-wing" political views.[101] The *Healy* court concluded "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right" implicit in the freedoms of speech, assembly, and petition of the First Amendment.[102]

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[97] *Id.* at 1158 ("The Trademark Office licenses ISU marks to recognized student organizations that espouse controversial ideas, activities, or lifestyle choices without the assumption that the University supports or endorses any of those ideas, activities, or lifestyle choices. Defendants acknowledge that licensing a trademark to a student group does not mean that ISU takes a position on what the group represents.").

[98] "Appellants not only want an exception that swallows the rule – they want rules to be obliterated where there are *possible* exceptions." Brief for Appellee, *supra* note 34, at 39.

[99] *See generally id.* at 1 (relying on apposite cases Healy v. James, 408 U.S. 169 (1972), Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995), and Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988)).

[100] 408 U.S. 169 (1972).

[101] *Id.* at 187–88, 192–93 ("The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

[102] *Id.* at 181. The Supreme Court continued: "[The students'] associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual

Consistent with the reasoning in *Healy*, the Supreme Court in *Rosenberger v. Rector & Visitors of the University of Virginia* affirmed the principle that universities serve as a model for fundamental free speech rights, and cannot discriminate against their students' expression on the basis of the students' viewpoint.[103] The Court held in *Rosenberger* that the university similarly violated the free speech rights of its students by denying the funding request of a Christian student newspaper.[104] In making its funding generally available to student organizations, the Court reasoned that the university had created a limited public forum for private speech.[105] Even though *Rosenberger* involved the allocation of university funding, rather than physical meeting space provided to student groups and community organizations,[106] the Court found the forums analogous and applied the same requirement of viewpoint-neutrality.[107] Accordingly, the Court did not allow the university in *Rosenberger* to favor one speaker over another, based on content, regarding a "space" it had opened up to use by its students.[108] The Court found that such viewpoint-based discrimination violated the First Amendment rights of the students.[109]

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give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial." *Id.* at 181–82.

[103] 515 U.S. 819, 845 (1995).

[104] *Id.* at 845–46.

[105] *Id.* at 829 (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 390 (1993)).

[106] *Cf. Lamb's Chapel*, 508 U.S. at 395 (holding the denial of a church access to school premises after-hours to exhibit a film series violated the First Amendment free speech clause).

[107] *Rosenberger*, 515 U.S. at 830 ("The [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

[108] *Id.* at 895–96 (declining to differentiate between physical and intangible "meeting space" for purposes of expressive activity protected by the First Amendment).

[109] *Id.*; *see also id.* at 833–34 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, and we did not suggest in *Widmar,* that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it

Consistent with this line of cases, NORML argued that the question of viewpoint discrimination by universities had been tried and settled.[110] From a student's perspective, favoring certain student organizations over others based on the content of their message is contrary to a university's central, historical purpose of fostering an environment of intellectual maturation and civic dialogue among its students.[111] Ultimately, NORML urged that universities cannot be allowed to circumvent the prohibitions of viewpoint discrimination simply because the space they make available to their students does not resemble traditional, physical forums of speech.[112]

3. The *Gerlich* Decision

The *Gerlich* ruling was praised by advocates of individual liberties and students rights groups,[113] but also created an anxious tension with officials and administrators in higher education.[114] Affirming the district court's decision in full, the Court of Appeals

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favors but instead expends funds to encourage a diversity of views from private speakers.") (citing Rust v. Sullivan, 500 U.S. 173 (1991)). The Eighth Circuit applied this same principle nearly a decade prior to *Rosenberger*, holding that a public university could not siphon off funding from a student organization promoting gay rights and gender equality, simply because the university did not agree with the group's political message. *See generally* Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988). Similar to *Rosenberger*, in *Gohn* the university had made funding generally available to student groups but denied funding to one advocating for gay rights because it disagreed with its view on that issue. *Id.* at 362–65, 367. The university's denial of funding violated that student organization's First Amendment rights because the university deviated from established funding procedure specifically because of the group's viewpoint on gay rights. *Id.* at 367.

110 *See* Brief for Appellee *supra* note 34, at 13–14 (arguing that "Few First Amendment principles are more clearly established than the prohibition on viewpoint discrimination, which the Supreme Court has described as "an egregious form of content discrimination." (quoting *Rosenberger*, 515 U.S. at 828–29)).

111 Brief for Appellee, *supra* note 34, at 14–15.

112 *See Rosenberger*, 515 U.S. at 830.

113 Marieke Tuthill Beck-Coon, *Eighth Circuit reaffirms victory at Iowa State: School still can't censor pot legalization T-shirts*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (FIRE) (June 14, 2017), https://www.thefire.org/eighth-circuit-reaffirms-victory-at-iowa-state-school-still-cant-censor-pot-legalization-t-shirts/ [https://perma.cc/UT9V-NWNC].

114 *See generally Six Top Tips for Your Internal Trademark Licensing Policies*, HIGHER EDUC. LEGAL INSIGHTS (July 27, 2017), https://www.lexology.com/library/detail.aspx?g=dee82d16-d7a1-43ed-8a4d-289415937c47 [https://perma.cc/3CEN-H5V8].

for the Eighth Circuit embraced the arguments advanced by NORML wholeheartedly.[115]

The federal circuit court disagreed with ISU's contention that the university's trademark licensing regime constituted government speech for two reasons. First, the court concluded that, consistent with *Rosenberger*, the university had "created a limited public forum" in its administration of its trademark licensing regime by making "its trademarks available for student organizations if they abided by certain conditions."[116]

The court reasoned that even if the regulation of the use of ISU's trademark by student organizations did not actually establish a limited public forum, ISU did not use its trademark licensing regime to express itself or communicate any message, and thus ISU's trademark could not constitute government speech.[117] Under *Walker*, the court determined that ISU had not historically used its trademarks as a medium for its own speech because the university allowed nearly 800 student organizations to use its trademarks each year and the record reflected that ISU officials repeatedly asserted that the university did not intend to communicate any message to the public through the trademark's use by student groups.[118] In any event, concluded the Eighth Circuit, the government speech doctrine could not apply to ISU's trademark since it had already established that licensing student organizations to use university trademarks creates a limited public forum.[119] The *Gerlich* court uniformly rejected the argument that, through NORML's use of ISU's trademark, the university was engaging in

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115 Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 705–10.

116 *Id.* at 705 ("A university 'establish[es] limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects.'") (quoting Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010)).

117 *Id.* at 707–08.

118 *Id.* (citing Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015)).

119 *Id.* at 707. This sort of circular reasoning commonly occurs throughout the *Gerlich* decision, and helps demonstrate how the Eighth Circuit over-simplified the underlying Free Speech issue.

expressive activity through its association with and implied endorsement of the student group's message.[120]

The Eighth Circuit concluded by reprimanding the university's senior leadership for their actions against the students of NORML, stating that "[t]he record is also replete with statements from defendants regarding their political motives."[121] In fact, the court publicly condemned ISU officials for undermining the institution's core function—preparing students for civic engagement and democratic participation as citizens—when it implied that the students of NORML were not contributing to the free exchange of dialogue on campus by advocating for legislative change in Iowa marijuana laws.[122] As such, the court found that this publicity and political attention ISU's trademark received when associated with NORML's t-shirt design played a direct and controlling role in its decision to censor the student group's use of its trademark moving forward, constituting impermissible viewpoint discrimination in violation of the First Amendment Free Speech Clause.[123]

In a concurring opinion upon rehearing by the panel, Judge Jane Kelly articulated a more pointed rebuke to the arguments offered by ISU. "In at least four cases the Supreme Court has held that a university creates a limited public forum when it distributes benefits to recognized student groups . . . . These factually analogous precedents are no less apposite simply because the court cites no case addressing a trademark licensing program."[124] Judge Kelly convincingly points out that ISU's purported reason for denying NORML the trademark use does not stand up to close

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120 *Id.* at 706; *see also id.* at 712–15 (Kelly, J., concurring).

121 *Id.* at 706.

122 "Hill stated in an interview with the Ames Tribune that the reason student groups associated with political parties could use ISU's logos, but groups like NORML ISU may not, is because '[w]e encourage students to be involved in their duties as a citizen.' Such a statement implies that Hill believed that the members of NORML ISU were not undertaking their duties as citizens by advocating for a change in the law." *Id.*

123 *Id.* at 708–10.

124 *Id.* at 710–11 (citing Christian Legal Soc. Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 1, 679, 685(2010)); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 841 (1995); Widmar v. Vincent, 454 U.S. 263, 269 (1981)); Healy v. James, 408 U.S. 169, 181–82 (1972); Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362 (8th Cir. 1988).

scrutiny.[125] If ISU's rationale holds true, ISU presumably would have rejected the t-shirt design the first time, when it was initially proposed.[126] Indeed, "[p]articipants in a [limited public] forum, declared open to speech ex ante, may not be censored ex post when the sponsor decides that particular speech is unwelcome."[127] Ultimately, the court held university officials certainly would have—or should have—known that denying access to a channel of speech after receiving negative reviews based on the message conveyed would not be a permissible exercise of viewpoint discrimination, even if such concerns were legitimate.[128]

II. THE "MIXED-SPEECH" DILEMMA IN STUDENT EXPRESSION ON COLLEGE CAMPUSES

Issues that accompany student speech occurring on the campuses of higher education institutions are incredibly complicated. Despite the ease by which the *Gerlich* Court reached its conclusion, the surrounding case law is far from being "clearly established." In truth, such speech often implicates First Amendment interests of multiple parties on campus and can be best understood as "mixed speech"—speech that bears expressive qualities and consequential interests of both students and the university.[129] The Supreme Court itself has acknowledged that the development of its First Amendment jurisprudence in recent years has left the doctrinal framework uncertain and nearly unnavigable.[130] In fact, Chief Justice Roberts sarcastically remarked during the oral argument of a recent school speech case,

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125 *See generally infra* Part III and accompanying discussion.

126 *Gerlich III*, 861 F.3d at 714 (Kelly, J., concurring).

127 *Id.* at 715 (Kelly, J., concurring) (quoting Hosty v. Carter, 412 F.3d 731, 737 (7th Cir. 2005)) (emphasis added).

128 *Id.* at 709; *id.* at 714–15 (Kelly, J., concurring). *See also* Cornelius v. NAACP, 473 U.S. 788, 811 (1985) ("The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a façade for viewpoint-based discrimination.").

129 Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 234 (2013).

130 *See id.* at 214–15 n.19.

Morse v. Frederick,[131] how complex even the preliminary question of determining the speaker and analyzing the expression, let alone characterizing the forum itself, can be.[132]

Evaluating a free speech claim against a university presents a number of issues complicating traditional First Amendment forum analysis. Determining the "speaker," first and foremost, presents the greatest challenge. But even with this hurdle cleared, deciding in what context, or forum, to analyze the speech at issue is similarly unclear. Finally, considering the university's interest in the speech, as it relates to the institution's mission and reputation, confronts the question of how the university's imprimatur is implicated and whether or not this matters constitutionally. Taken together, it becomes less clear who the "speaker" is in mixed-speech cases for purposes of adjudicating First Amendment

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131 551 U.S. 393 (2007).

132 "CHIEF JUSTICE ROBERTS: You think the law was clearly established when this happened that the principal, that the instant that the banner was unfurled, snowballs are flying around, the torch is coming, should have said oh, I remember under *Tinker* I can only take the sign down if it's disruptive. But then under *Fraser* I can do something if it interferes with the basic mission, and under *Kuhlmeier* I've got this other thing. So she should have known at that point that she could not take the banner down, and it was so clear that she should have to pay out of her own pocket because of it.

MR. MERTZ [counsel for Frederick]: Mr. Chief Justice, there are two different time points we have to talk about. There's the heat of the moment out there on the street, but then later back in the office when she actually decided to levy the punishment after she had talked to him, after she heard why he did it and why he didn't do it, after she had had a chance to consult with the school district's counsel. At that point in the calmness of her office, then she should indeed have known it. And she did testify that she had taken a master's degree course in school law in which she studied *Kuhlmeier* and *Fraser* and *Tinker*. So —

CHIEF JUSTICE ROBERTS: And so it should be perfectly clear to her exactly what she could and couldn't do.

MR. MERTZ: Yes.

JUSTICE SCALIA: As it is to us, right? (Laughter.)

JUSTICE SOUTER: I mean, we have a debate here for going on 50 minutes about what *Tinker* means, about the proper characterization of the behavior, the nonspeech behavior. The school's terms in dealing with the kids that morning. The meaning of that statement. We've been debating this in this courtroom for going on an hour, and it seems to me however you come out, there is reasonable debate. Should the teacher have known, even in the, in the calm deliberative atmosphere of the school later, what the correct answer is?" Transcript of Oral Argument at 48–50, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278), http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-278.pdf [https://perma.cc/5J4Q-467C].

disputes between universities and their students, and whose interests should prevail. The following Parts will address each of these issues, respectively.

A. Who is the Speaker?

Though it may seem straightforward on its face, determining who actually owns the speech at issue arguably presents more problems than it solves.[133] In fact, the Supreme Court predicted in the *Pleasant Grove City* case that "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech."[134] Public schools and universities, like private entities, are capable of expression in non-traditional ways that a court should take into account when analyzing a claim under the Free Speech Clause.

The government can speak in a variety of ways. In general, the Supreme Court has held that a government entity is capable of speaking itself, or when adopting the view of a particular private speaker as its own.[135] Furthermore, public universities may "speak" through the association or promotion of "private mouthpieces" even when they do not agree with or purport to endorse that speaker's viewpoint.[136] A university promoting or associating with a multitude of private speakers, expressing an array of individual viewpoints, may constitute the university's expression in a way that represents a broad, multi-faceted

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[133] *See* Brownstein, *supra* note 6, at 751 ("In the public school context, distinguishing government speech decisions (which are not reviewed under the Free Speech Clause) from student speech restrictions in school-sponsored activities (which are reviewed under *Hazelwood*) may seem to be a deceptively straightforward task. The key question would be who is doing the talking.").

[134] Pleasant Grove City v. Summun, 555 U.S. 460, 470 (2009).

[135] *See generally id.*; Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015); *Pleasant Grove City*, 555 U.S. 460.

[136] *See* Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. LJ. 1, 55–56 (2007); *see, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998); *see generally* Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71 (2004).

"viewpoint."[137] State actors at large also engage in their own speech activity where they exercise editorial discretion in selecting the expressive material of third parties—"editorial choices" by public entities are, according to the Supreme Court, communicative acts.[138]

For example, one federal appellate court applied *Walker* and *Pleasant Grove City* to find that billboards erected around the outfield of a public high school's baseball field constituted government speech because the banners bore the imprimatur of the school, and the school exercised "substantial control" over the messages conveyed by the banners, effectively reserving the right to speak for itself through individual private actors.[139] Consequently, the court held the First Amendment allowed the

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[137] *See* Blocher, *supra* note 136. *But see* Randall P. Bezanson, *The Government Speech Forum:* Forbes *and* Finley *and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 993–94 (1998) ("Not only must government's claimed relationship to a controllable speaker be a legitimate one grounded in government's interest in the speech activity itself (rather than welfare payments or construction contracts), but the speech restrictions must also be voluntary and related to government's valid expressive purposes (as employer, policymaker, subsidizer, purchaser, patron). Moreover, government's expressive purpose must be explicitly stated, the conditions placed on speakers must be narrowly adapted to communicating the intended message, and government's expression must be additive and participatory, not exclusive and monopolistic.").

[138] *Ark. Ed. Television Comm'n*, 523 U.S. at 679 ("On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission.'"); *Nat'l Endowment for the Arts*, 524 U.S. at 587–88 (noting that government entities have "wide latitude to set spending priorities" and "allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake" without violating the First Amendment; but acknowledging "a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace."). The *Forbes* Court distinguished an instance where the public television station, controlled by the state, chose to invite certain political candidates to a televised debate from the instance in *Widmar v. Vincent*, 454 U.S. 263 (1981), where a public university made university facilities generally available to student organizations but denied access to a group seeking to use them for religious worship in violation of the First Amendment as a content-based discrimination.

[139] *See* Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1074 (11th Cir. 2015) ("When the government exercises the right to speak for itself, it can freely select the views that it wants to express. This freedom includes choosing not to speak and speaking through the . . . removal of speech that the government disapproves.").

school to remove the advertisement of a math tutor who doubled as an adult film actor.[140] Instances of curricular speech, expressed by students themselves, can also constitute speech by the university.[141] Under the current Free Speech jurisprudence analyzing editorial choices in a teacher's curriculum,[142] government speech could conceivably encompass instances where a teacher assigns a student to read his or her history report to the rest of the class, or where school rules state that funding for a student newspaper may be used to express only the messages that the university wants to communicate.[143]

However, as the *Gerlich* court points out, these instances of a university speaking itself, or speaking through private actors, are distinguishable from a university merely facilitating the speech of private parties.[144] In this latter category, universities may not discriminate based on viewpoint because the speech is associated more with the individual student than it is with the university.[145] When facilitating the association and expression of student organizations through official recognition or budgetary allocations, universities may not deny expressive opportunity on the basis of a particular group's viewpoint, message, or political ideology.[146]

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[140] *See id.* ("Because characterizing speech as government speech 'strips it of all First Amendment protection' under the Free Speech Clause, we do not do so lightly.") (quoting Walker v. Tex Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2255 (2015)) (Alito, J., dissenting).

[141] *See also* Brownstein, *supra* note 6, at 736–37, 750, 769 ("By analogy, student speech that is part of a curricular activity may also constitute government speech.").

[142] *See, e.g.*, Mayer v. Monroe Cty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007); Chiras v. Miller, 432 F.3d 606, 614 (5th Cir. 2005); Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1015–16 (9th Cir. 2000); *see also Ark. Educ. Television Comm'n*, 523 U.S. at 674 (reasoning in dicta that "public school prescribing its curriculum" is not subject to the restraints of the Free Speech Clause).

[143] Brownstein, *supra* note 6, at 736.

[144] *See* Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 709 (8th Cir. 2017).

[145] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995) (citing Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–72 (1988)).

[146] *See id.* at 833–34 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, and we did not suggest in *Widmar*, that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors

Indeed, the Supreme Court's decision in *Widmar v. Vincent*[147] explicitly forbids viewpoint discrimination in university accommodations of expression.[148] The *Widmar* Court held that where a public university makes its campus facilities generally available to student groups for expressive purposes, it may not deny access based on the group's content or viewpoint.[149]

While many courts determine whether a particular instance constitutes university or student speech on an ad hoc basis,[150] only rarely do they more thoroughly examine the nature of the particular expression at issue.[151] The Tenth Circuit Court of Appeals decision in *Fleming v. Jefferson County School District R-1*[152] is one occasion of a school-related speech dispute where a court took advantage of the opportunity to do so. That case involved an art initiative at a public elementary school, inviting students, parents, and community members to paint tiles that would be placed around the campus.[153] The tiles had to conform to certain guidelines and

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but instead expends funds to encourage a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.") (internal citations omitted); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 368 (8th Cir. 1988). *See also* Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998) ("[A] more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'") (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

147 454 U.S. 263, 277 (1981).

148 *Id.* ("[W]e affirm the continuing validity of cases, e.g., *Healy v. James*, 408 U.S. at 188–89, that recognize a University's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.").

149 *Id.* ("Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.").

150 Brownstein, *supra* note 6, at 750.

151 *Id.* at 757–58 (noting the different approaches taken by courts to resolve speech-related issues in public schools, but ultimately concluding that the case law reflects "a muddled lack of clarity about the relationship between these overlapping frameworks").

152 298 F.3d 918, 923 (10th Cir. 2002).

153 *Id.* at 920–22.

were subject to the approval of the school administration.[154] The Tenth Circuit Court of Appeals fashioned its own analysis to determine the nature of the speech, asking: (1) whether the central purpose was to promote views of the school or private speaker; (2) whether the school exercised editorial control over the speech content; (3) whether the school was the literal speaker; and (4) whether ultimate responsibility for the speech rested with the school.[155] Based on these factors, the Tenth Circuit ultimately concluded that the tiles did not represent school speech, but instead were *school-sponsored* speech upon which the school could properly place viewpoint-oriented restrictions when related to legitimate pedagogical concerns.[156] Such a searching inquiry, however, is rare.

Courts, along with most scholars, are loath to attribute speech to a university.[157] This hesitancy is with good reason. By classifying the expression as pure "government speech," the expression is essentially exempted from First Amendment scrutiny.[158] Doing so removes any First Amendment protections from students implicated with the speech and negates their

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154 *Id.* at 920.

155 *Id.* at 923.

156 *Id.* at 924 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988)).

157 *See, e.g.*, Corbin, *supra* note 17, at 662–671 (noting that classifying instances of competing "mixed speech" between student and university interests "lessens the likelihood that the government will be held accountable for its advocacy" and "distorts the marketplace of ideas by making some viewpoints seem more popular than they actually are"); Bowman, *supra* note 129, at 283 (arguing that in all instances *except* teachers' instructional classroom speech, "the government speech doctrine either is not a fit at a fundamental level, or it undermines one or both of the public goods so substantially that applying it to that category of cases is indefensible"). Other scholars embrace the government speech doctrine, but, recognizing its implications, propose more stringent requirements on its application. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 698, 706–19 (2011) (advocating for the application of the government speech doctrine "when the government establishes itself as the source of the contested speech both formally and functionally – i.e., where the government claims the speech as its own when it authorizes the express, and where onlookers understand that expression to be the government's at the time of its delivery").

158 *See infra* Part IV.2 (examining the viability of the government speech doctrine in university free speech cases); *See also* Walker v. Tex Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246–48 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009).

interests entirely.[159] Such a result is problematic because in an instant the students' interest in the speech is all but obliterated, giving the university carte blanche authority to censor speech occurring on its campus based on whatever interest it has at stake.[160]

In fact, attempting to determine whether the speech belongs exclusively to the university or its students is, in large part, a false choice. Viewing speech in this binary is of little use in instances, such as *Gerlich*, where both parties seem to be speaking (or at least have independent interests in expression's content) simultaneously.[161] Indeed, it is convenient—and more appropriate—to imagine "mixed speech" in the higher education setting as existing on a continuum: pure university speech and its interest in protecting its imprimatur on one hand and speech attributable solely to students and student organizations on the other.[162]

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[159] *See* Randall Bezanson & William Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1429 (2001) ("Government speech cannot logically be made a function of the office of the person making an allocation decision. That approach would elevate form over substance and would enable the government to dictate the First Amendment result simply by manipulating the agency in the decision-making process.").

[160] *See Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting) ("Unfortunately, the Court's decision categorizes private speech as government speech and thus strips it of all First Amendment protection.").

[161] *See* Lyrissa Lidski, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2011–12 (2011); Bowman, *supra* note 129, at 234–35 & nn.124–27.

[162] Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. Rev. 605, 607 (2008) ("The trouble with this dichotomy is that not all speech is purely private or purely governmental. In fact, much speech is the joint production of both government and private speakers and exists somewhere along a continuum, with pure private speech and pure government speech at each end."); Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1358–59 (2001) ("Between the extremes of private speech and government speech lies the vast middle ground of government/private speech interaction," describing subsidies of private speech of private actors); Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1319–20 (2004) ("But sometimes speech may most accurately be described as simultaneously belonging both to government and to private individuals or groups. This is often the case when a public actor offers private speakers an expressive opportunity that is especially attractive because it appears to carry some indication of government endorsement or imprimatur. Recognizing that public and private entities sometimes speak jointly may help us sort through some of these hard cases.").

Yet Courts have consistently (and, quite easily) dismissed universities' interests in its students' speech by relying on such a university-student binary, viewing the case as a purely government speech case or a purely private speech case.[163] Further, they routinely fail to consider the possibility that universities may have an interest in the expression.[164] Instances of co-existent interests in the content of expressive activity, like *Gerlich*, likely fall somewhere in the middle between the two ends of the spectrum. Though some commentators have gone so far as to consider an entirely new speech category,[165] few have actually engaged in this sort of inquiry, and most continue to rely on this public-private binary.[166] As aptly put by one scholar,

> [I]f mixed speech is categorized as private speech, the government cannot discriminate against any viewpoints. Consequently, discounting the government component of mixed speech may lead to government endorsement of undesirable messages (like offensive or hate speech) or government endorsement of religious messages in violation of the establishment clause . . . . [I]f mixed speech is categorized as government speech, the government may censor viewpoints. Viewpoint discrimination, however, may undermine the free speech interests of both speakers and audiences and distort the marketplace of ideas. Furthermore . . . the government's chosen viewpoint could be mistaken for private preferences. The resulting

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163 Bowman, *supra* note 129, at 278; *See also id.* at 280 & n.371 ("Even what is the closest call [on the university and student speech continuum]—the speech of student organizations, which arguably could be classified as mixed speech between the organization and the school whose name it uses—consistently has been classified by courts as purely student, nonmixed speech.") (citing Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 387 (1993); Widmar v. Vincent, 454 U.S. 263, 277 (1981)).

164 *See* Norton, *supra* note 162, at 1330.

165 *See generally* Brownstein, *supra* note 6. Brownstein advocates for the creation of a whole new forum, the "nonforum," where (1) government property and activities that are pervasively expressive in nature and serve intrinsically expressive functions; (2) circumstances where notions of federalism and separations of powers should preclude intrusive judicial review of speech regulations; and (3) the expressive activity reasonably bears the imprimatur of the state. *Id.* at 784.

166 *See* Bowman, *supra* note 129, at 235.

lack of transparency permits the government to advance its policy positions without being held accountable for its advocacy.[167]

However, if courts care to examine the mutual, co-existent interests involved in instances of mixed speech on college campuses, "this recognition would more accurately describe the speech itself."[168]

In sum, public universities are capable of expressive activity as government actors either by speaking themselves or endorsing private speakers to serve as their mouthpieces for views they endorse. Identifying the true "speaker" in cases of student speech on college campuses is rarely as straightforward as it seems, and a more rigorous inquiry by courts is needed on this front.

B. What is the Forum?

The difficulties in evaluating free speech claims on university campuses do not stop after determining the speaker(s) in a given case. "Mixed-speech" issues on university campuses are more complicated than simply determining who is speaking, and hastily basing decisions solely off the speaker's identity can create even more analytical problems.[169] Another embedded issue is evaluating the forum in which the speech is occurring.

The type of forum in which the expression is made is a critical element to effectively assessing the rights of the speaker(s) and determining the permissible restrictions, if any, a university may put in place. More specifically, the *purpose* for which the forum

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167 *See* Corbin, *supra* note 162, at 608, 610.

168 Bowman, *supra* note 129, at 236. *But see* R. George Wright, 31 S. ILL. U. L.J. 175, 197–98 (2007) ("The law seeks to distinguish between speech by some party that is apparently or actually approved by the school from speech by the school itself, made officially on behalf of the school by an authorized agent of the school. At its simplest, then, the law seeks to distinguish between nonpublic forum speech that the school merely somehow approves or sponsors, and official speech on behalf of the school itself by its agents. The distinction between speech in a nonpublic forum that the school somehow sponsors and speech by or officially in the name of the school is inevitably vague, if it is tenable at all. We should therefore be reluctant to try to impose radically different free speech tests on such only hazily distinguishable categories.").

169 *See* Brownstein, *supra* note 6 at 751.

was created is highly significant.[170] Some scholars have opined that the results reached in free speech cases occurring on university campuses are often inconsistent, if not wrong, largely because of the reviewing court's preliminary articulation of the forum at issue.[171] In other words, the way that a court classifies the context of the expression itself colors the free speech analysis because it often turns out to be *inconsistent with*, *unreasonably interfere with*, or *fail to account for* the forum's actual stated purpose or intended use.[172] Alternatively, examining the forum's purpose may complicate identifying who the true speaker is or, if there are several speakers, recognizing all of the expressive interests at stake. If the university's intent is to open the forum for different students as private speakers to express their own views, then a court can more easily attribute the speech to those students.[173] By contrast, if the forum's purpose, evidenced by the university's intent, is to combine a number of select messages that represents the university's own viewpoint or even speak for itself, then the speech more closely reflects the expression of the public university and can be treated as such.[174]

Further, some First Amendment scholars have identified the government speech doctrine itself as a separate forum.[175] Rather

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[170] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity . . . The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves."); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 688–90 (2010).

[171] *See, e.g.*, Brownstein, *supra* note 6, at 717–18, 721–23.

[172] *See id.*

[173] *See generally* Healy v. James, 408 U.S. 169 (1972); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[174] *See generally* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

[175] Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. L. REV. 809, 811 (2010). *See also* Bezanson & Buss, *The Manner Faces of Government Speech, supra* note 159, at 1406 ("In its most primitive form, the doctrine created a very nice compromise: it opened up government property for a constitutionally favored activity – the exercise of the freedom of speech—at minimal cost, given that speech in traditional public forums burdened the government's ordinary use of its property very little."). Although not stated quite so explicitly, Brownstein essentially suggests the same thing in his call to doctrinally establish his vision of the "nonforum." *See* Brownstein, *supra* note 6, at 785 ("The secondary thesis of this Part of the Article is that school-sponsored

than merely protecting the government's ability to speak, "[the government speech doctrine] grants the government a *forum* for its expression that can span time, place, and space, and in which only ideas it favors may be spoken, and other ideas with which the government would ordinarily have to compete may be excluded."[176] This, again, alters the identification of who the owner of the expressive activity really is in a mixed speech case. Others still have gone so far as to argue that forum analysis is outright inapplicable when the government has an expressive interest; that if a university is speaking at all, in any expressive capacity, forum analysis becomes inappropriate because it ignores the interest in speech that is "arguably at least partially that of the school."[177]

Just as misidentifying the speaker can lead a court to analyze an incomplete picture of speech occurring on college campuses, so too does glossing over the identity of the forum in which the expression is occurring. As described above, this colors the analysis of free speech rights, even affecting the earlier identification of who the speaker is. Court analyzing First Amendment cases in the university setting must carefully identify the forum in which the speech at issue is occurring so as to examine the speech in light of the purpose of that forum.

C. University Imprimatur and Educational Mission

Even if an instance of mixed speech is properly understood to weigh more on the side of private speech by a student, institutions of higher education retain a strong interest in exercising some sort of control over its content.[178] The associational properties of a student's viewpoint ties the expression to the institution and implicates its imprimatur.[179] Indeed, courts have supported the notion that public elementary schools have an interest in

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activities constitute a nonforum, and as such, government control of student speech in such activities should be shielded from free speech scrutiny.").

176 Bezanson, *supra* note 175, at 811.

177 *See* Bowman, *supra* note 129, at 237–38, 276–78.

178 "Private speech bearing the imprimatur of a school or of the state is problematic for a different reason. It creates a real risk that the content of private messages will be misattributed to government." Brownstein, *supra* note 6, at 798.

179 *Cf.* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 281 (1988).

disassociating themselves from curricular speech that is inconsistent with the school's "shared values of civilized order" or "associate[s] the school with any position other than neutrality on matters of political controversy."[180] The Supreme Court in *Hazelwood School District v. Kuhlmeier* recognized that public elementary schools may censor or otherwise exercise "editorial control" over student speech that could be reasonably perceived to bear the imprimatur of the school, so long as the restrictions are "reasonably related to legitimate pedagogical concerns."[181] *Hazelwood*'s holding was confined to the kindergarten to twelfth grade setting and the Court has not yet applied it to the higher education context;[182] however, numerous federal circuit courts of appeal have analyzed *Hazelwood* and concluded that imprimatur concept does—or should—extend to the university level.[183]

Though the concept of university imprimatur has largely been decided in cases involving school curricular activities,[184] there seems to be little reason not to extend this principle to *extra*-curricular speech as well.[185] Many courts already justify applying

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[180] Frank LoMonte, *"The Key Word is Student": Hazelwood Censorship Crashes the Ivy-Covered Gates*, 11 FIRST AMEND. L. REV. 305, 317 (2013) (quoting *Hazelwood*, 262 U.S. at 271–72).

[181] *Hazelwood*, 484 U.S. at 273.

[182] Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 383 (2013) (arguing that a modified form of *Hazelwood*'s imprimatur rule should be applied to the unique situations presented in "certification cases" at the university level).

[183] *See, e.g.*, Keeton v. Anderson-Wiley, 664 F.3d 865, 875 (11th Cir. 2011); Ward v. Polite, 667 F.3d 727, 735 (6th Cir. 2012); Axon-Flynn v. Johnson, 356 F.3d 1277, 1289 (10th Cir. 2004).

[184] *See, e.g.*, *Hazelwood,* 484 U.S. 260.

[185] The language defining the contours of *Hazelwood* is very broad. Justice White, writing for the majority, explained that school-sponsored activities "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood*, 484 U.S. at 271; *see also* Brownstein, *supra* note 6, at 763; Bowman, *supra* note 129, at 275–78. *But cf.* Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 715 n.8 (8th Cir. 2017) (Kelly, J., concurring) (stating the opposing viewpoint that *Hazelwood* is limited to instances "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences") (quoting *Hazelwood*, 484 U.S. at 271); LoMonte, *supra* note 180, at 362 ("Although *Hazelwood* did not deprive students of all

Hazelwood's principles to speech occurring well outside of the curricular setting.[186] Indeed, the notion that learning outside the classroom is not new—involvement with student organizations and other extra-curricular activities still serves the purposes and pedagogical goals of higher education institutions by encouraging intellectual growth and maturation.[187]

Even when not bearing the direct imprimatur of the educational institution, schools may restrict speech that is—or is perceived to be—inconsistent with its educational mission. The Supreme Court in *Morse v. Frederick*[188] decided that it did not violate students' First Amendment rights to be restricted in wielding a banner at a school-sponsored rally that said "Bong Hits 4 Jesus."[189] The Court found that because the message could reasonably be construed to endorse the use of illegal drugs, in violation of school policy, the school had a special interest in disassociation from such speech in the educational setting, even where the rally occurred outside of the curriculum.[190] Though the school's imprimatur was not directly implicated, because no "reasonable" observer would perceive the students' speech as bearing the school's endorsement, *Morse*

First Amendment protection—the burden remains on the government to come forward with a justification "reasonably related to legitimate pedagogical concerns"—in practice, the *Hazelwood* standard has become a virtual rubber stamp for whatever excuse for censorship a school can muster.").

186 Brownstein, *supra* note 6, at 763–65, 769 n.170, 818 n.285.

187 *E.g.* Planned Parenthood of S. Nev., Inc. v. Clark Cty. Sch. Dist., 941 F.2d 817, 825 (9th Cir. 1991) ("High schools foster learning experiences inside and outside the classroom and serve pedagogical as well as *in locus parenti* purposes."); *see also* Brad Dickens, *Reclaiming Hazelwood: Public School Classrooms and Return to the Supreme Court's Vision for Viewpoint-Specific Speech Regulation Policy,* 16 RICH. J.L. & PUB. INT. 529, 549 (2013) (concluding that the Supreme Court intended *Hazelwood* to apply in narrow instances where schools must have complete control over "speech that appears to be the official voice and opinion of the school and ultimately the government"; necessarily, "[v]iewpoint neutrality simply has no place within an accurate reading of *Hazelwood*").

188 551 U.S. 393 (2007).

189 *Id.* at 400.

190 *See id.* at 408 ("The "special characteristics of the school environment and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.") (internal citations omitted).

supports the notion that at least *some* viewpoint discrimination in the education setting is permissible when it implicates core concerns of a school's educational mission.[191]

However, the Supreme Court has also noted that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."[192] Indeed, the private speech at issue must be somehow attributable to the university, or its core educational mission, for it to bear the imprimatur of the school.[193] Nevertheless, *Hazelwood* has been applied in instances where the speech at issue cannot reasonably be attributed to or mistaken for endorsement by the educational institution, often in an effort by courts to reconcile the institution's interest in the speech with the students' own expressive rights.[194] Though, whether the speech at issue bears the imprimatur of the school is a prime point of contention among judges and scholars alike,[195] and failing to

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191 *See* LoMonte, *supra* note 180, at 307 & n.14.

192 Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990).

193 *Compare* Hazelwood Sch. Dist v. Kulmeier, 484 U.S. 260, 271 (1988) (concluding that "the question whether the First Amendment requires a school affirmatively to promote particular student speech" "concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.") *with* Morse v. Frederick, 551 U.S. 393, 405 (2007) ("*Kuhlmeier* does not control this case because no one would reasonably believe that [the student's] banner [advocating drug use] bore the school's imprimatur.").

194 Le Monde, *supra* note 180, at 320–21 ("Courts have applied *Hazelwood* even where no reasonable listener would confuse the individual speech for the officially sanctioned word of the school."); *see, e.g.*, C.H. v. Olivia, 226 F.3d 198, 213 (3rd Cir. 2000) (en banc); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1984); Bannon v. Sch. Dist. Palm Beach Cty., 387 F.3d 1208 (11th Cir. 2004).

195 "While *Hazelwood* certainly applies to many things that occur in the classroom . . . nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment. On the contrary, *Hazelwood* governs only those expressive activities that might reasonably be perceived 'to bear the imprimatur of the school.' . . . Things that students express in class or in assignments when called upon to express their own views do not 'bear the imprimatur of the school' . . . and do not represent 'the [school's] own speech.'" *Olivia*, 226 F.3d 198, 213–14 (3d Cir. 2000) (Alito, J., dissenting) (quoting *Hazelwood*, 484 U.S. at 271; Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995)).

recognize this tension completely ignores a university's competing interest in the speech on its campus.[196]

Even where instances of mixed speech on college campuses can most reasonably be attributed to student-based speakers, there are instances, described above, where that private speech nevertheless implicates the imprimatur and implicit endorsement of the university. To fully analyze the speech rights at issue, a reviewing court should be cognizant of if and how student-dominant speech can bear expressive qualities of the university with which the student affiliates.

III. ANALYSIS: DARKENING THE MUDDIED WATERS OF FIRST AMENDMENT RIGHTS ON COLLEGE CAMPUSES

After exploring the complexities of mixed speech instances on college campuses, it is more than apparent that there is no easily navigable analysis. The lack of coherent doctrinal framework has frustrated constitutional law scholars and judges alike, while further imposing hardships on higher education institutions in negotiating how they decide to respect expressive activities occurring on campus.

Yet courts, like the Eighth Circuit in *Gerlich*, continue to resolve free speech disputes between students and their university without engaging with the nuances examined above in any meaningful way.[197] The issues surrounding the speech interests in *Gerlich* are much more nuanced—and have much greater ramifications—than the Eighth Circuit's ruling reflects. While the *Gerlich* Court was likely correct in its ultimate conclusion—that post hoc viewpoint discrimination runs counter to fundamental principles embodied in the First Amendment[198]—it nevertheless

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196 *See* Brownstein, *supra* note 6, at 798 ("Private speech bearing the imprimatur of a school or of the state is problematic for a different reason. It creates a real risk that the content of private messages will be misattributed to government.").

197 *See infra* Part II, and accompanying discussion. *See also* Corbin, *supra* note 17, at 672 (noting the inconsistent approaches the Supreme Court, and lower courts, have taken to analyze cases that present the dilemma of "mixed speech").

198 Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 705 (8th Cir. 2017). Indeed, "[c]onduct may be prohibited or regulated, within broad limits. But government may not

misses the analytical mark in its forum analysis. At the same time, neither the position advanced by ISU,[199] nor that of NORML,[200] successfully articulates the intricacies of First Amendment jurisprudence in the university setting or properly resolves their conflicting expressive interests. As discussed below, the *Gerlich* decision summarily dismisses the complexity of mixed speech instances on college campuses and declines to acknowledge the inherent interest that higher education institutions have in the use of their intellectual property by student organizations. In short, the court could have been reached the same conclusion with a more rigorous free speech analysis examining the full spectrum of expressive interests at stake in this instance of "mixed speech." The following Parts will examine each position in turn.

A. Viability of the Government Speech Doctrine

First and foremost, the *Gerlich* Court too quickly and summarily dismissed the expressive qualities of ISU's trademark and the university's interest in student groups', like NORML, use of its intellectual property. Instead of engaging in a meaningful discussion of the points raised by the university, the Court assumed the trademark constituted a limited public forum and summarily concluded "[t]he government speech doctrine does not apply if a government entity has created a limited public forum for speech."[201] This circular logic is at odds with a comprehensive analysis of instances of mixed speech and demonstrates how courts can come to predetermined conclusions when the identity of the speaker and nature of the forum are glossed over without a more searching inquiry about the character of the expression in question.[202]

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discriminate against people because it dislikes their ideas, not even when the ideas include advocating that certain conduct now criminal be legalized." Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 368 (8th Cir. 1988).

[199] *See generally supra* Part I.B.1 (laying out the arguments advanced on appeal by ISU).

[200] *See generally supra* Part I.B.2 (laying out the arguments advanced on appeal by NORML).

[201] *Gerlich III*, 861 F.3d at 707.

[202] *See supra* Parts II.A–B.

The principles behind the government speech doctrine are certainly important to consider when analyzing instances of "mixed speech," as in the present case. In some instances, it could be possible to treat mixed speech *as if* it were government speech.[203] Universities do, and should, have the ability to selectively license their trademarks. At the very least, account should be taken for when a university's imprimatur is implicated; even as an institution of higher education, ISU should be able to disassociate itself from matters of political controversy and express neutrality on matters occurring within the curriculum.[204] As discussed above, there are at least some compelling reasons to extend this rationale to *extra*-curricular speech that serves pedagogical goals as well.[205] If trademarks are in fact inherently expressive devices, then the *Gerlich* court erred in wholly ignoring the fact that ISU in some way retains expressive interests by licensing its trademarks to student organizations.

Nevertheless, the Eighth Circuit appropriately declined to rule that the trademark constituted government speech. The consequences of classifying ISU's trademark as government speech ultimately outweigh its utility to ISU; the doctrine is inconsistent with the applicable First Amendment jurisprudence regarding speech rights on college campuses. If the government speech doctrine were to apply to ISU's trademark, then student groups denied access to its use would be entirely cut off from any redress by courts, as the trademark would be exempt from First Amendment protection.[206] What would stop a university like ISU from only allowing its trademark to be used by student organizations with conservative (or, vice-versa, liberal) ideologies?[207] If the university's aim is to "speak" in support of

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203 *See* Brownstein, *supra* note 6, at 789.

204 Hazelwood v. Kuhlmeier, 484 U.S. 260, 271–72 (1988).

205 *See supra* Part III.C; Bowman, *supra* note 129, at 276–78.

206 Bowman, *supra* note 129, at 230.

207 The need to guard against partisan restrictions on speech has long been recognized by the Supreme Court. *See, e.g.*, Healy v. James, 408 U.S. 169, 180–81 (1972) ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

these viewpoints and adopt them to be recognized as its own, to the exclusion of contrary views, the parallels to blatant viewpoint suppression surrounding cases like *Healy* and *Rosenberger* are clear. On the other hand, if the university's goal in licensing its trademark to student groups is to achieve a "diversity of views" to represent it, then the university is not really achieving its own goal.

Further still, application of the government speech doctrine to the facts of *Gerlich* undermines the rationale on which university control of its own speech is based. If the government speech doctrine is premised on the idea that public entities should be able to control their own message,[208] then a university should not be able to censure certain speech just because it is *not aligned* with its expressive interest; rather, censorship may make sense where the speech actually *interferes* with the university's own message and educational mission.[209] Otherwise, the university risks nullifying the speech interests of its students. Understood in this way, it was not appropriate to apply the government speech doctrine to NORML's use of ISU's trademark because the group's message was not, in fact, interfering with ISU's educational mission. While not advocating for drug *use*, which might be permissibly censored under *Morse*, political dialogue and advocacy for *legislative change* is certainly consistent with the educational mission of an institution of higher education like ISU.

B. Muddied Waters of Forum Analysis

Even if the *Gerlich* court was doctrinally correct in refusing to extend the government speech doctrine to the case of university trademarks, it was not necessarily appropriate for it to consider the trademark a limited public forum.[210] In the case of ISU's trademark, the Eighth Circuit failed to appreciate the *purpose* for which such a forum would have been created by the university.[211]

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[208] *See* Bowman, *supra* note 129, at 282.

[209] *See* Morse v. Frederick, 551 U.S. 393, 423–24 (2007) (Alito, J., concurring); Bowman, *supra* note 129, at 282.

[210] *See* Gerlich v. Leath (*Gerlich III*), 861 F.3d 697, 705, 707 (8th Cir. 2017) (identifying the university's trademark as a limited public forum).

[211] *Compare id.* at 714 (Kelly, J., concurring) (assuming without discussing ISU's purported purpose of its trademark as a "forum" for student expression) *with id.* at 719–

The purpose for which a forum is made accessible to the public for private expression is a central feature of a limited public forum; the purpose of the forum is what actually dictates whether the distinction between allowed and excluded speech is permissible under the First Amendment.[212] Yet courts have routinely failed to consider the nature and purpose of government property,[213] despite the Supreme Court holding that as much is necessary in evaluating the permissibility of censorship in a university's limited public forum.[214]

The purpose of ISU's trademark licensing scheme (like that of any other public university) was presumably to enhance the image of the university and lend support to the messages of student groups that were not inconsistent with its educational mission and cultivated public image.[215] The Student Organization Guidelines demonstrate this limited scope of the "forum," expressly granting student organizations the *privilege* of using ISU's trademarks, subject to certain criteria.[216] Student organizations like NORML are certainly not entitled to use ISU's trademark; they must fulfill the requirements of ISU's trademark use policy and fill out an

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20 (Loken, J., dissenting) (recounting that "a limited public forum is not created absent clear intent to create a public forum" and noting ISU's "central purpose was to protect and promote ISU's public image, and the program guidelines explicitly reserve[d] the forum for this purpose" which contributed to the complexity of the majority's forum analysis (citing Hazelwood v. Kuhlmeier, 484 U.S. 260, 270–71 (1988))).

212 *See* Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 687–88 (2010) (holding that, even in a limited public forum, a university cannot exclude speech where the distinction is not reasonable view in light of the purpose of the forum); Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

213 *See* Brownstein, *supra* note 6, at 787 nn.232–33 (citing Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1784–85 (1987) and Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1262–64 (2005)).

214 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see also Martinez*, 561 U.S. at 687–88.

215 *See* Brief for Appellant, *supra* note 30, at 3–4; *Gerlich III*, 861 F.3d at 719–20 (Loken, J., dissenting).

216 *Gerlich III*, 861 F.3d at 719–20 (Loken, J., dissenting); *Trademark Management Policy Statement*, *supra*, note 27.

application that lays out its proposed design incorporating the trademark.[217] Students are not given permission to use it unless it conforms to specified guidelines.[218] Indeed, *Gerlich* more closely resembles an instance where the university has merely "reserved eligibility" for a class of speakers who must then "individually, obtain permission"—and the Supreme Court in *Forbes* has specifically stated that such instances do not create a limited public forum.[219]

The *Gerlich* court's forum analysis is weakened also because its reliance on traditional student speech cases not implicating the expressive interests of a university trademark is tenuous. Unlike *Rosenberger*[220] and *Gohn*[221], where university recognition and funding was overtly necessary for the student groups to exercise their First Amendment rights to association and free expression at all,[222] the speech of student organizations like NORML who are denied use of ISU's trademark is *not actually cut off*. In *Rosenberger* and *Gohn*, funding was *required* in order for the students to advocate for their viewpoint on gender and sexual equality and effectively speak as a student organization on campus.[223] The *Gerlich* court's reference to *Martinez*,[224] *Widmar*,[225] and *Healy*,[226] in addition to *Rosenberger*, as "four cases [in which] the Supreme Court has held that a university

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[217] *See generally Guidelines for University Trademark Use by Student and Campus Organizations*, *supra* note 50.

[218] *See generally id.*

[219] *See* Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 670 (1998).

[220] *See Gerlich III*, 861 F.3d at 705 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995)).

[221] *See id.* at 705, 707 (discussing and analogizing the facts in *Gerlich* to those in Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362–67 (8th Cir. 1988)); *see also supra* note 109 (discussing the facts of *Gohn* and its parallels nearly one decade prior to *Rosenberger*).

[222] *See Rosenberger*, 515 U.S. at 830, 836 (noting that permitting viewpoint discrimination in the funding of student organizations would exclude those viewpoints from campus); *Gohn*, 850 F.2d at 366–68 (same).

[223] *See Rosenberger*, 515 U.S. at 823.

[224] *Gerlich III*, 861 F.3d at 710–11 (Kelly, J., concurring) (citing Christian Legal Soc'y Chapter of Univ. Cal., Hastings Coll. Law v. Martinez, 561 U.S. 661, 685 (2010)).

[225] *Id.* (citing Widmar v. Vincent, 454 U.S. 263, 269 (1981)).

[226] *Id.* (citing Healy v. James, 408 U.S. 169, 181–82 (1972)).

creates a limited public forum when it distributes benefits to recognized student groups" similarly misses this point.[227] Analogies to *Martinez* suffer the same critique as *Rosenberger* and *Gohn* in that imposing a school-wide nondiscrimination policy on student groups' operations created prerequisite conditions for the student organization, and its speech, to occur on campus in the first place.[228] Similarly, university policy in *Widmar*, excluding religious groups from the institution's "open forum policy," manifestly denied religious groups the ability to express themselves on campus.[229] And the socialist student organization in *Healy* depended on university recognition to *exist on campus at all*.[230] These cases are in stark contrast to the ultimate consequences of denying a student group use of a trademark. Student organizations like NORML still possess the ability to speak on campus through their t-shirts without the use of the university trademark. Alternatively, NORML students could have altered their mode of expression to comply with ISU guidelines, without changing their substantive message or viewpoint, to speak with the trademark. In fact, ISU made it clear that NORML could use its trademark to advocate the same pro-marijuana legislation message by simply removing any explicit mention or image of a marijuana leaf.[231] Comparatively, NORML's injury in being denied permission to use ISU's trademark can at best be described as an indirect burden on its expression.

The nature of the "forum" in these cases is different as well. In both *Rosenberger* and *Gohn*, the university funds granted to student organizations passed from the university to the students themselves to be spent upon their own volition in pursuit of their advocacy.[232] By contrast, even though NORML conveyed considerable expression of its own through ISU's trademark, property rights to ISU's trademark never changed hands. ISU at all

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227 *See id.* at 710–11 (Kelly, J., concurring).

228 *See Martinez*, 561 U.S. at 685.

229 *Widmar*, 454 U.S. at 269.

230 *See Healy*, 408 U.S at 181–82.

231 *Gerlich III*, 861 F.3d at 703.

232 *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 825–26 (1995); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362–63 (8th Cir. 1988).

times owned and possessed its intellectual property, even though *use* was permitted.[233] ISU retained a vested property interest in its trademark's value, which the *Gerlich* court ignored.[234] This begs the question: If ISU created a limited public forum by making its trademark available to student organizations, does it similarly do so when licensing them to private companies outside the university? Does the university then impermissibly discriminate based on viewpoint every time it rejects a third party's trademark license application?

The concurring opinion in *Gerlich* brings a persuasive counterargument to this point.[235] It was undisputed that ISU adopted its trademark policy changes *after* NORML used its initial design.[236] The design was not disapproved on the basis of its reference to drugs in the first instance, so why was it a matter of such concern the second time around? The concurrence correctly points to Supreme Court case law decreeing that "[t]he existence of reasonable grounds for limiting access to [even a] nonpublic forum . . . will not save a regulation that is in reality a façade for viewpoint-based discrimination."[237] Indeed, universities, and the government at large, cannot be allowed to censor speech after the fact, only when certain ramifications of the speech that it does not like occur.[238] At the end of the day, it is not quite defensible to assert, as ISU did throughout litigation, that it did not engage in viewpoint discrimination against NORML and its student participants. Yet, it is simply incorrect to state that ISU, as a government entity, did not possess expressive interests or a viewpoint of its own associated with its registered trademark only because it had lent out use of the trademark to student groups expressing a wide variety of views.[239]

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233 *See generally* Trademark Management Policy, *supra* note 27; *Guidelines for University Trademark Use by Student and Campus Organizations*, *supra* note 50.

234 *See Gerlich III*, 861 F.3d at 697.

235 *See id.* at 710–16 (Kelly, J., concurring).

236 *See id.* at 701–03.

237 Cornelius v. NAACP Legal Def. Fund, 473 U.S. 788, 811 (1985).

238 *See* Hosty v. Carter, 412 F.3d 731 (2005).

239 *See supra* note 94 and accompanying text; *cf.* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679–80 (1998) (distinguishing between cases of "general access"

On the other hand, it is an inescapable conclusion that universities perform viewpoint discrimination in one way or another, whether it be in the classroom or out. Indeed, "viewpoint discrimination is inextricably a part of education. One cannot communicate the messages involved in an educational process without exercising choice—without choosing some messages and not others; and without making these choices on the basis of the content of the available alternatives."[240] If universities are to be financially and organizationally operable, without every decision instigating dispute and litigation, then First Amendment analysis of student speech rights must accommodate *some degree* of viewpoint discrimination that is currently not permissible in forum analysis. However, it can be safely said, as Judge Kelly's concurrence pointed out, that it is clearly established that public universities cannot do so "simply because it finds the views expressed by any group to be abhorrent."[241]

IV. RECOMMENDATION: LESSONS FROM THE *GERLICH* CLASSROOM

Once courts accept that there are instances where expressive activity carries the interests of both students and their university, it is clear that a new approach must be taken to understanding these instances of "mixed speech" where such interests are competing and, often, entirely at odds. The *Gerlich* case on the campus of Iowa State University presents one such instance—mixed-speech cases in the university setting are not new, and will not go away.[242]

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that constitute a designated or limited public forum, and "selective access" which constitute nonpublic a forum).

240 Bezanson & Buss, *supra* note 159, at 1420.

241 *Gerlich III*, 861 F.3d at 715 (Kelly, J., concurring) (quoting Healy v. James, 408 U.S. 169, 187–88 (1972)).

242 Social media and online technology are already playing a large role in school speech cases. *See* Page v. Lexington Cty. Sch. Dist., 531 F.3d 275, 281 (4th Cir. 2008) (ruling that a public school district's use of its website to promote a position on pending legislation before the state legislature constitute government speech not subject to First Amendment scrutiny). Access to speech on government-maintained social media sites is also a subject of debate among scholars. *See generally* Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301 (2013) (arguing that, while some have argued for application of the government speech doctrine

While there are certainly more intellectually-rigorous pursuits that courts can—and should—embark on when analyzing free speech claims from students expressing themselves on university campuses, there are also more practical approaches that institutions of higher education can pursue when navigating the muddied waters of student free speech rights to fairly accommodate student expression on campus.

A. Judicial Approaches to "Mixed Speech" Issues on College Campuses

First and foremost, courts should stop viewing speech occurring in the higher education setting on a public-private binary. As described above, this system pits the interests of higher education institutions in maintaining their image against the interests of their students in seeking to grow as intellectuals and citizens. It is, ultimately, a zero-sum game. And the *Gerlich* ruling perpetuates this zero-sum confrontation between ISU and its students.[243] The result of similar rulings will be to exacerbate and intensify relations between university officials and students on campuses across the country, at a time when tensions among civically-minded students are already at an all-time high.[244] Judicial rulings that take the time to weigh the respective interests of both parties, by contrast, recognize the fact that both parties are

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to federal government agency social media sites, public forum analysis is more appropriate).

[243] *See Gerlich III*, 861 F.3d at 705.

[244] *See generally* Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163 (2018) (noting that conflicting speech rights, both between students and between students and their universities, have been occurring with greater frequency and adding to heightened political tension on college campuses). The tensions existing on the campus of the University of California, Berkeley are an especially apt example of what is in store for universities when student free speech rights are not properly defined. *See* Conor Friedersdorf, *UC Berkeley Declares Itself Unsafe for Ann Coulter*, THE ATLANTIC (Apr. 20, 2017), https://www.theatlantic.com/politics/archive/2017/04/uc-berkeley-declares-itself-unsafe-for-ann-coulter/523668/ [https://perma.cc/Z6FN-ZXFW]; *see also* Eugene Volokh, *UC Berkeley's Chancellor's Message on Free Speech*, WASHINGTON POST (Aug. 23, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/23/uc-berkeley-chancellors-message-on-free-speech/?utm_term=.2a6b805153b6 [https://perma.cc/UTW7-MCTJ].

engaging in constitutionally-significant expressive activity. Even if a court ultimately concludes that the speech rights of the students involved (or their on-campus organizations) should prevail in a given First Amendment showdown, such a result is more intellectually honest and in practice achieves a more just result.[245]

In the *Gerlich* case, it can hardly be disputed that ISU has a legitimate proprietary interest in the use of its trademark. However, the particular facts of this case ultimately condemn it, even under a more favorable analysis. While recognizing that ISU has a significant interest in the use of its intentionally-branded trademark, courts and the legal community should not accept the fact that ISU changed its policies specifically to exclude NORML's proposed message as rationale for maintaining the university's expressive interest in its trademark.

B. Lessons from Gerlich: What Higher Education Institutions Can Do to Limit Liability When Licensing Official University Trademarks to Student Organizations

Aside from the more academic discussion in analyzing Free Speech claims from students on college campuses, colleges and

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[245] Applying *Hazelwood* might be a strong temptation for courts seeking to confront the concerns addressed in this Article and balance the conflicting expressive interests present in mixed speech cases. University trademarks certainly carry the imprimatur of the school with which they associate. In its application to *Gerlich*, for instance, where the trademark is used by a student organization, NORML *intended* their message to be associated with ISU and the organization's message was, in fact, attributed to the school. *See Gerlich III*, 861 F.3d at 701–04; Brief for Appellant, *supra* note 30, at 9. *Cf.* Morse v. Frederick, 551 U.S. 393, 405 ("*Kuhlmeier* does not control this case because no one could reasonably believe that [the student's] banner bore the school's imprimatur."). But *Hazelwood*'s applicability, even under a generous reading of that case, is tenuous at best. *Hazelwood*'s core recognition of the school's imprimatur is central to recognizing that university activity may impute expressive interests into an instance of student speech to create a mixed speech dilemma. But in the case of student organizations' use of the university's trademark, there is no immediate pedagogical interest at stake or even direct faculty oversight. *See* Dickens, *supra* note 187; LoMonte*, supra* note 180, at 362–63 ("Although Hazelwood did not deprive students of all First Amendment protection—the burden remains on the government to come forward with a justification "reasonably related to legitimate pedagogical concerns"—in practice, the Hazelwood standard has become a virtual rubber stamp for whatever excuse for censorship a school can muster.").

universities can take *Gerlich* as a learning opportunity to accommodate student speech while managing its own expressive interests. *Gerlich* illustrates how to avoid legal pitfalls and negative publicity.[246] Crucially, institutions of higher education must expressly define those "forums" which are opened to expressive use by student organizations and others seeking association with the university through their trademarks. Universities must, in other words, preemptively declare the *purpose* for which that intellectual property "forum" is available for use by student organizations. Just as universities can publically declare for what specific type of expression and association they intend to make an empty classroom available after hours, they can similarly articulate the extent to which their trademarks are available for student use. At least one university has already done so, broadly reserving the right to restrict the future use of any "forum" associated with that university to its defined purpose, while maintaining its ability to also promote its own message.[247]

Along these lines, a general policy on usage standards articulating the permitted and prohibited uses of the licensed trademark would serve universities well as a pre-established, viewpoint-neutral standard to manage its institutional message and associational imprimatur.[248] Specific to *Gerlich* and university trademark policies, higher education institutions should include in their policies a declaration of what it intends the trademark to convey and the purpose behind licensees' use.[249]

Whether it is a university's intent to endorse a specific message of a particular student group, adopt an array of diverse and multifaceted viewpoints, or convey its own institutional message, a university can and should take the opportunity to articulate its official trademark use policy. Doing so establishes clarity and transparency to place interested licensees, such as student

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246 *See generally Gerlich III,* 861 F.3d 697 (8th Cir. 2017).

247 Emory University Open Expression Committee, *In re Emory Integrity Project Chalkboards and Other Limited Public Forums* (Sept. 26, 2017), http://senate.emory.edu/documents/2017%20-%202018/cfoe-limpubforum-6.pdf [https://perma.cc/35PD-WMKX].

248 *Six Top Tips for Your Internal Trademark Licensing Policies*, *supra* note 114.

249 *Gerlich III*, 861 F.3d at 701.

organizations, on notice of university expectations. Moreover, strategic planning on an official usage standard aids in the prevention of highly public confrontations with its students and embarrassing public fallout; at the same time, it also avoids First Amendment violations against its students. *Gerlich* should serve as a wake-up call to higher education institutions across the country: failing to articulate and define the university's own expressive interests and the standards of associational messaging like trademarks invites conflict between university officials and student groups. In sum, higher education institutions should have a thoroughly thought-out, well-articulated, and defined policy regarding their students' use of their intellectual property—written and reviewed by legal counsel. An important takeaway from *Gerlich* is that the restrictions ISU put in place would almost certainly have been constitutionally permissible had they been established from the onset of NORML's use of the trademark, as opposed to being established as a response to the group's controversial viewpoint.[250]

As a final and obvious point, universities should not deviate from their established trademark use policies and involve legal counsel earlier in the process when handling interactions between the university and its student organizations to ensure compliance. This is true even regarding those interactions that do not involve the use of university trademarks. Student affairs concerning the freedom of speech—especially those touching controversial social and political issues—have become highly sensitive matters that require careful forethought and planning to avoid constitutional infirmity.[251] In short, universities must do anything they can to avoid allegations of viewpoint discrimination by applying their use standards and licensing requirements equally to all groups. And

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[250] *See Morse*, 551 U.S. at 410 (holding a school does not violate the First Amendment by restricting speech that is inconsistent with or reasonably viewed to violate established school policy).

[251] For a recent example of a university caught in the cross-fire between politically-engaged students and an ideologically-opposed public speaker, see Scott Jaschik, *Ann Coulter vs. Berkeley, Round 2*, INSIDE HIGHER ED (April 24, 2017), https://www.insidehighered.com/news/2017/04/24/new-round-debate-over-ann-coulter-and-her-right-speak-berkeley [https://perma.cc/95VM-XNJA].

when the instance arises when the license to use a trademark is denied, universities should thoroughly explain why the license application was denied and work with the student organization to help cure the defect.[252] *Gerlich* serves as a case in point. Even if the underlying rationale behind the *Gerlich* decision is conceptually flawed, the fact remains that the change in trademark use policy was a direct reaction to NORML's legislative advocacy and the publicity it received; the timing of ISU officials' actions cannot be ignored.[253] Had legal counsel been involved earlier, and a more thoroughly-prepared licensee use policy defining the ISU's expressive interest established and adhered to, a thought-out approach to altering the university's trademark-use policy could have been crafted to achieve its needs without serving as a rebuke—intentional or not—to the viewpoint expressed by students seeking to use the trademark in association with their campus organization.[254] In short, the best measure institutions of higher education can take is to employ legally-trained professionals to engage and forge relationships with the students at the heart of ideological debates, establishing the university's role in student expression and political discourse before it is caught in an undesirable position.

CONCLUSION

Instances of speech and expression on college campuses are rarely as straightforward as they appear—*Gerlich v. Leath* provides an excellent example of how some speech by university students naturally implicates legitimate concerns and interests by institutions of higher education.[255] Courts presiding over campus speech disputes often fail to recognize such cases as "mixed speech" incidences, which has led to an incoherent and messy body of case law.[256] As it currently stands, First Amendment jurisprudence fails to reconcile these two often competing interests

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252 *Six Top Tips for Your Internal Trademark Licensing Policies*, *supra* note 114.
253 *See Gerlich III*, 861 F.3d at 697.
254 *See id.*
255 *See id.*
256 *See* discussion *supra* Part III.A.

in expressive activity on college campuses.[257] *Gerlich* is no different.[258] Yet, both parties' arguments in *Gerlich* miss the mark.[259] Classifying student expression that implicates the university's imprimatur or public image, like ISU's federally-registered trademark, as government speech is problematic in that it wholly exempts the students' speech from judicial review and protection of the First Amendment.[260] On the other hand, a doctrine that automatically allows a federal court to label a university's intellectual property a "limited public forum" without further inquiry ignores the institution's proprietary interest and associational concerns with the trademark's use.[261] Courts can learn from the *Gerlich* decision by opting out of this public-private binary, and fairly adjudicating the merits of each party's interests in the expressive activity. This process would establish a way for universities to navigate the tumultuous political activity occurring on their campuses. Finally, higher education institutions should learn from *Gerlich* and craft their trademark use policies in such a way as to articulate the university's First Amendment interest in the trademark and narrowly define the purpose for which it is to serve as a "forum" for student expression.[262]

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257 *See* discussion *supra* Part III.B.
258 *See Gerlich III*, 861 F.3d at 697.
259 *See* discussion *supra* Part III.A.
260 *See id.*
261 *See* discussion *supra* Part III.B.
262 *See Gerlich III*, 861 F.3d at 697.